



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: M & M Filipino Cuisine--Reconsideration

File: B-253576.3

Date: October 19, 1993

Elenita D. Canaling-Nixon and Rosaleta D. Pabalan for the protester.

Michael J. Farley, Esq., and Kenneth A. Markison, Esq., Department of Housing and Urban Development, for the agency. Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Dismissal of protest against award by a government prime contractor to a subcontractor which allegedly is not qualified to provide food services to a multi-family housing project is affirmed, since the General Accounting Office has no jurisdiction to review subcontracts awarded by a prime contractor when the subcontract award is not made "by or for" the government.

DECISION

M & M Filipino Cuisine (MMFC) requests reconsideration of our decision in M & M Filipino Cuisine, Gloria's Runway Cafe, B-253576; B-253576.2, July 2, 1993, 93-2 CPD ¶ 5, in which we dismissed its protest of the award of a subcontract by Republic Management Services, Inc. (RMS) pursuant to its contract with the Department of Housing and Urban Development (HUD). We dismissed the protest because it did not involve any of the limited circumstances under which we review challenges to subcontract awards under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1993).

We affirm the dismissal.

RMS manages The Lorenz Hotel, in Redding, California, under a contract with HUD in which it serves as project manager. The hotel is a multi-family housing project owned by HUD. Under the contract, RMS is responsible for conducting the day-to-day management duties necessary to operate, repair, and properly maintain The Lorenz Hotel; these duties include subcontracting for such services as may be necessary. Pursuant to this responsibility, RMS prepared request for proposals (RFP) No. RM-016F-RD for a subcontract for food

services, and submitted it to HUD for approval. Several proposals were received in response to the solicitation, and RMS made award to La Lorenz.

MMFC submitted its protest to our Office on May 27, 1993, arguing both that La Lorenz was not qualified for award, and that MMFC's proposal satisfied the RFP requirements at a much lower cost than that of the awardee. Our Office dismissed the protest because we only review subcontract awards by government prime contractors where the award is "by or for" the government. 4 C.F.R. § 21.3(m)(10); Ocean Enters., Ltd., 65 Comp. Gen. 585 (1986), 86-1 CPD ¶ 479, aff'd, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10.

On July 16, MMFC requested reconsideration of its protest, arguing that the subcontract was made "for" the government. In support of its position, MMFC cites language contained in both the prime contract and in the RFP which it contends indicates direct government involvement in the subcontract.¹

Our limited bid protest review of subcontract awards is based on our statutory authority to consider bid protests involving the procurements of federal agencies. See 31 U.S.C. § 3551(1) (1988). Obviously, a prime contractor normally is not a federal agency and is not viewed as such merely because it awards a subcontract pursuant to a prime contract with the government. However, in certain circumstances, where it is clear that the prime contractor essentially is acting on behalf of the government, we view the prime contractor's actions as coming within the scope of our jurisdiction.

Generally, a subcontract is considered to be "for" the government where the prime contractor principally provides large-scale management services to the government and, as a result, generally has on-going purchasing responsibility. In effect, the prime contractor acts as a middleman or

¹MMFC also seems to argue that the subcontract is a contract made "by" the government; it points to language in the prime contract that requires RMS to "assist" HUD in preparing solicitations for repair work or other procurements to be awarded by HUD, and language concerning the payment of payroll expenses. These cited provisions do not pertain to food services subcontracts; moreover, they do not show that HUD's involvement in the subcontractor selection is so pervasive that the contractor is a mere conduit for the government. See Perkin-Elmer Corp., Metco Div., B-237076, Dec. 28, 1989, 89-2 CPD ¶ 604.

conduit between the government and the subcontractor. See Ocean Enters., Ltd., supra. Such circumstances may exist, for example, where the prime contractor operates and manages a government facility, Westinghouse Elec. Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145, otherwise provides large-scale management services, Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44, serves as an agency's construction manager, C-E Air Preheater Co., Inc., B-194119, Sept. 14, 1979, 79-2 CPD ¶ 197, or functions primarily to handle the administrative procedures of subcontracting with vendors actually selected by the agency. University of Mich.; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. Except in these limited circumstances, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered to be "by or for the government." United Applied Techs., Inc., B-238794.2, Sept. 12, 1990, 90-2 CPD ¶ 199.

Here, while PMS was providing management services for a government-owned facility, it was not performing the type of large-scale governmental operations resulting in ongoing purchasing responsibility that would render its subcontract awards "for" the government. See Royal Investigation and Patrol, Inc., B-250690, Feb. 17, 1993, 93-1 CPD ¶ 149. Although RMS is responsible for day-to-day management functions, HUD retains responsibility for maintenance, repair and construction needs. Moreover, while The Lorenz Hotel is owned by the government, it is not a "government facility" as defined by the Federal Acquisition Regulation (FAR).²

MMFC contends that the RFP's provision instructing offerors that HUD's accounting subcontractor, rather than RMS, would make payments under the subcontract indicates that the subcontract was made "for" the government. The agency explains that, under the prime contract, subcontracting expenses are handled on a cost reimbursement basis. For administrative purposes, HUD pays all of the subcontracting and other reimbursable costs on its property management contracts through the Property Management System. Accordingly, after a property manager certifies that the subcontracting work was satisfactorily completed, the subcontractor's invoice is sent to HUD's accounting


²The FAR defines a government facility in the context of a management and operating contract as a "research, development, special production, or testing establishment." FAR § 17.601. A HUD multi-family housing project does not qualify as a government facility for the purpose of applying the "by or for" exception to subcontract awards. Royal Investigation and Patrol, Inc., supra.

contractor, which then pays the subcontractor directly. This administrative procedure, which merely removes one step from the usual cost reimbursement procedure, does not lead us to conclude that the subcontract was made "for" the government.

MMFC finally points to RFP language, such as the provision of a government technical representative and the standard FAR service of protest clause, as evidence that the subcontractor selection was "for" the government. We disagree. As we stated in our prior decision, such language is "boiler plate"; the agency reports that these provisions were apparently included in the solicitation inadvertently based on earlier HUD contracts which may have been used as a sample for the services required. See Target Corp., B-205283.2, Aug. 24, 1982, 82-2 CPD ¶ 170.

Since the subcontract was not made "by or for" the government, we again conclude that we have no jurisdiction to consider this matter. See Aviation Data Serv., Inc.--Recon., B-238057.2, Apr. 11, 1990, 90-1 CPD ¶ 383.

The prior dismissal is affirmed.


for James F. Hinchman
General Counsel